

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 95 OF 2023
High Court No. HAC 046 of 2023

BETWEEN : **ROSHNI LATA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Kumar. N for the Appellant**
Shameem S. for the Respondent [ODPP]

Date of Hearing : **14 March 2024**

Date of Ruling : **16 April 2024**

RULING

1. The appellant was charged at the Lautoka Magistrate Court, with 1 count of Dangerous Driving Occasioning Death, contrary to section 97(1) (2) and 114 of the Land Transport Act 1998.

Statement of Offence

Dangerous Driving Occasioning Death: *Contrary to section 97 (2) (c) (5) (d), (8) and 114 of the Land Transport Act 35 of 1998.*

Particulars of Offence

ROSHNI LATA *on the 6th day of July, 2015 at Lautoka in the Western Division drove a motor vehicle registration number DD 665 on Kings Road, Drasa Flat, in a manner dangerous to another person, involved in an impact with a bicycle ridden by Reuben James Summerlin and occasioned the death of the said Reuben James Summerlin.*

Background

In the Magistrate Court

2. The appellant pleaded not guilty and after numerous adjournments proceeded to trial proper on 18th September, 2020. There was a voir dire hearing in which the Magistrate's Court ruled that the caution interview of the appellant was admissible in evidence. At trial proper the prosecution called six witnesses and after the Magistrate's Court found there was a case to answer and the appellant gave evidence for defence.
3. By judgment dated 9th June, 2023 the trial Magistrate found the appellant guilty and convicted her accordingly. After hearing mitigation on 17 July 2023, the appellant was sentenced to 2 years imprisonment with a non-parole period of 18 months to be served before the appellant is eligible for parole with a disqualification from driving for the next 2 years and 3 months.
4. The brief summary of facts are as follows:
 - a. On 6th July, 2015 between 7:00 to 7:30am after the Tropik Woods junction on the Drasa flats a white van registration number DD665 driven by the appellant was going towards Lautoka. The appellant overtook two to three vehicles whilst over speeding.
 - b. In the opposite lane on the side of the road going towards Ba was the deceased riding a bicycle. The appellant's van collided with the bicycle, as a result of the impact the deceased flew from his bicycle and landed in a nearby drain about 9.5 meters away from the point of impact.

- c. The brake marks from the vehicle driven by the appellant were 19.8 meters on one side and 24 meters on the other side. The brake marks started from the lane where the appellant's van was travelling.
- d. The medical cause of death of the deceased was massive subarachnoid haemorrhage due to traumatic severe injury as a consequence of multiple traumatic fractures from a road accident.
- e. The appellant was arrested, caution interviewed and charged.

In the High Court

5. The appellant being aggrieved by the conviction of the Magistrate's Court filed a timely petition of appeal to the High Court, at Lautoka. For the appeal in the High Court, the appellant filed seven grounds of appeal, and with the leave of the court, one additional ground of appeal was added. A further 7 grounds of appeal was filed following the change in counsel for the appellant.
6. Before the High Court there were a total of 16 grounds of appeal submitted by the various lawyers who appeared for the appellant. This was reduced to 4 grounds which the High Court Judge considered in its appellate jurisdiction hearing. These grounds are set out below to show that at each stage of the appeal a new set of grounds of appeal were submitted.
7. Grounds of appeal in the High Court appeal hearing are:
 - i. The trial Magistrate failed to engage with the appellant and respondent's case.
 - ii. The trial Magistrate failed in providing adequate and/or any reasons for his judgement
 - iii. The trial Magistrate did not follow proper path of reasoning in arriving at its conclusions
 - iv. The trial Magistrate erred in law and fact when he engaged in conduct that resulted in shifting of the onus and legal burden of proof.

8. The High Court Judge in a judgement delivered on 25 October 2023, dismissed all the grounds of appeal due to lack of merit and upheld the conviction against the appellant

Court of Appeal – Leave to Appeal Hearing

9. On 21 November 2023, the appellant in person with assistance of her daughter, filed a Notice of Motion for Leave to Appeal against conviction and sentence in the Court of Appeal Registry. The Notice set out 14 grounds of appeal against conviction and 8 grounds of appeal against sentence. This was a timely appeal.
10. On 27 November 2023, the appellant with her daughter's assistance, filed a Notice of Motion and Affidavit in Support for application for Bail Pending Appeal. In this hearing the court will deal with both matters. The Bail Pending Appeal application will be assessed first, for in so doing the court will need to evaluate the prospect of success of the appeal grounds submitted for the Leave Application, as part of the section 17(3)(a) Bail Act 2002 requirements.

Bail Pending Appeal

11. The relevant principles and applicable provisions of the Bail Act in situation such as that presented in this application was reviewed in **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) where the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** [2012] FJCA 100 and repeated:

*"In **Zhong -v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

*"[25] **Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion.** The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. **The discretion is to be exercised in accordance with established guidelines.** Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. **In addition, the discretion is subject to the provisions of the Bail Act***

2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.

[26] *The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*

[27] *Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*

"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:

- (a) the likelihood of success in the appeal;*
- (b) the likely time before the appeal hearing;*
- (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*

[28] *Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In Apisai Vuniyayawa Tora and Others –v- R (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] *The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition*

to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of **bail pending appeal**. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.

[30] This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others v. The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:

"The likelihood of success has always been a factor the court has considered in applications for **bail pending appeal** and section 17 (3) now enacts that requirement. However, it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for **bail pending appeal** to delve into the actual merits of the appeal. That as was pointed out in **Koya's case (Koya v The State unreported AAU 11 of 1996 by Tikaram P)** is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."

[31] It follows that the long-standing requirement that **bail pending appeal will only be granted in exceptional circumstances** is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."

In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely "the likely time before the appeal hearing" and "the proportion of the original sentence which will have been served by the applicant when the appeal is heard" are directly relevant 'only if the Court accepts there is a real likelihood of success' otherwise, those latter matters 'are otiose' (See also **Ranigal v State** [2019] FJCA 81)

In **Kumar v State** [2013] FJCA 59; the Court of Appeal said 'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'

In **Qurai v State** [2012] FJCA 61; the Court of Appeal stated;

'It would appear that exceptional circumstances are a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).

On the other hand, exceptional circumstances are also relevant when considering each of the matters listed in section 17 (3).'

In **Balaggan** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

In **Qurai** it was stated that:

"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed..."

12. Having set out in some detail the relevant applicable law, now I consider section 17 (3)(a) of the Bail Act 2002 and assess its requirements against the submission advanced by the appellants. The three factors the court MUST consider are:

(i) Likelihood of success in the appeal

For a timely appeal like this one, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'**: **Caucau v State** [2018] FJCA 171; **Navuki v State** [2018] FJCA 172; and **State v Vakarau** [2018] FJCA 173; **Sadrugu v The State** [2019] FJCA 87; and **Waqasaqa v State** [2019] FJCA 144; that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; **Chaudry v State** [2014] FJCA 106; and **Naisua v State** [2013] FJSC 14; from non-arguable grounds: **Nasila v State** [2019] FJCA 84.

There were 4 grounds submitted vide court filing dated 11 March 2024, set out from pages 9 to 16.

13. Ground 1, allege that the trial judge erred in law and fact in not adequately/misdirecting himself on the law on circumstantial evidence. To assess this ground, it is the finding of the Magistrate Court that is must be looked at. The trial Magistrate set out his analysis

of the evidence at paragraph 9 of the Magistrate Court ruling and it contained the summary of the prosecution case which encompass all the relevant facts in evidence, pertaining to the element of the offence. On appeal to the High Court the High Court Judge at paragraph 12 to 15 of the judgement reviewed the finding of the Magistrates and concluded that it was adequate to support the conviction for the charge preferred against the appellant. It is noteworthy that the matter raised in this ground was not raised in the Magistrate Court or at the appeal to the High Court. This ground has no merit.

Ground 2 – the Magistrate erred in law when he disbelieved the appellant. To support this submission, counsel for the appellant did not state any legal principle which he claimed was not followed by the Magistrate. Instead, there was a long citation of cases whose relevance is doubtful. This ground has no merit.

Ground 3 – allege trial counsel incompetence due to the not calling ‘key-material witnesses’ at the trial. The Court of Appeal in **Baleiono v State** [2024] FJCA 49, in assessing a similar claim reviewed relevant caselaw and adopted the following:

*“In **TKWJ v The Queen** [2002] HCA 46, the High Court held that the course taken at trial reflected a forensic choice which was reasonably open to counsel. Gleeson CJ observed at [16]:*

“8. On the face of it, that was an understandable decision. It was certainly not self-evidently unreasonable, or inexplicable. It was the kind of tactical decision routinely made by trial counsel, by which their clients are bound. And it was the kind of decision that a Court of Criminal Appeal would ordinarily have neither the duty nor the capacity to go behind. Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts.

.....

16. It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of

unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K."

It is clear that the submissions submitted, in the light of the above case reference above, is inadequate. This ground has no merit

Ground 4: allege the trial Magistrate erred in law in failing to consider whether or not the deceased failed to comply with the Bicycle Act 1939 in that he was riding a mode of transport which was no supposed to be on the road and that created the dangerous situation. This ground is frivolous; frankly the relevance of the Bicycle Act to the charge that the appellant faced was not an issue at the trial and could not have been, given the charge that was preferred against her. A meritless ground.

In conclusion the grounds of appeal submitted in support of Leave to Appeal application have no reasonable prospect of success.

(ii) Likely time before the appeal hearing

It is difficult to give any definite time for the hearing, if the Leave to Appeal is renewed to the full court. It may be possible for it to be heard early 2025.

(iii) Proportion of sentence to be served

If the appeal is renewed, and it is fixed for hearing in the first session of 2024, the appellant would have served the 18 months non-parole period of his 2 years imprisonment sentence.

14. Bail pending appeal is not available on the strict terms of section 17(3) of the Bail Act 2020, based on the assessment above. As was approved in the Court of Appeal in **Qurai** (supra) this court may consider "exceptional circumstance," and the medical condition of the appellant is one such circumstances. The appellant is a convicted prisoner not on remand awaiting trial, so the threshold for bail pending appeal is high indeed. I have reviewed the latest submission of the appellant and the medical reports from Aspen Medical and Lautoka Hospital. It is clear that the appellant has serious heart issues and the doctors have recommended that an echocardiogram and angiogram be carried out. At the last court hearing, it was specifically requested by the court that that an appointment for a definite date for the echocardiogram and angiogram be made and the

court will consider making orders for the appellant to be released from prison to undergo such tests. That was not done. The court has not been informed why such appointments were not made and it is difficult to understand why not, if the medical condition of the appellant was so serious.

15. The respondent had submitted that existing medical facilities in the Correction Service is adequate to deal with the appellant's condition.

Appeal Against Sentence

16. At the hearing it was confirmed by counsel for the appellant that the appeal was against conviction and sentence. In the Amended Notice and Grounds of Appeal dated 17 January 2024, 2 grounds of appeal were advance against sentence. These are:

Ground 1: the trial Magistrate erred in law and fact in taking irrelevant matters into consideration when sentencing the appellant. This ground of appeal was not argued in the appellant's written submission filed on 11 March 2024. There was no submission made from counsel during the appeal hearing on 14 March 2024 addressing this ground. The court treats as withdrawn.

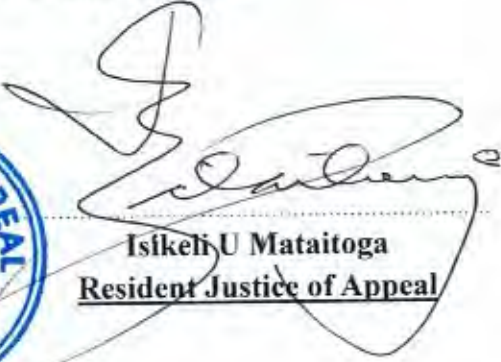
Ground 2: allege that the trial Magistrate erred in law and fact in superficially engaging with the prosecution evidence and/or case in accepting the prosecution evidence in total without following proper path of reasoning in arriving at its findings, conclusions and orders. This ground lacks any specific submission to clearly show how the sentence imposed was wrong in law. It has no merit and is dismissed.

17. In conclusion and in the light of the assessment made above, the bail pending application is refused, except that the appellant must be allowed to attend hospital for Echocardiogram and Angiogram evaluation. A copy of the Report from those tests may be made available to the court to review this decision. The Leave to Appeal is refused for the grounds submitted, because they have no reasonable prospect of success on appeal.

ORDERS

1. Bail Pending Appeal is refused.
2. The appellant will be allowed by the Correction Services, to attend a hospital for purposes of undertaking echocardiogram and angiogram examinations. A copy of the outcome to be made available to court.
3. Leave to Appeal is refused.
4. Leave to appeal against sentence is refused.




Isikeli U Mataitoga
Resident Justice of Appeal